Supreme Court. U.S.
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No. 99-1430

IN THE

Supreme Court of the United States

ALEXANDER G. LUNNEY, an infant, by his Father and natural guardian, J. ROBERT LUNNEY,

Petitioner,

v.

PRODIGY SERVICES COMPANY, a partnership of Sears, Roebuck & Co. and International Business Machines Corp.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The following describes the defendant and all publicly held companies that own 10% or more of the defendant's stock.

(1) Prodigy Services Company (the entity originally sued) was a joint venture of IBM and Sears. Prodigy Services Corporation succeeded to its business. As of August 3, 1998, Prodigy Services Corporation was merged into Prodigy Communications Corporation ("PCC"). PCC conducted a public stock offering in February 1999.

(2) PCC has two principal shareholders: Carso Global Telecom ("CGT"), which is a subsidiary of Group Carso; and Telefonos de Mexico, S.A. de C.V. ("Telmex"), which is a subsidiary of CGT. Each entity owns more than 10% of PCC's common stock.

(3) IBM and Sears sold their interests in Prodigy Services Company; however, they received 8% contingent convertible promissory notes and later received contingent warrants the result of which is that IBM and Sears received the combined right to acquire 15% of PCC's stock under certain conditions. As of December 31, 1999, IBM beneficially owned approximately 3,356,778 shares, or 5.2%, of PCC's common stock, which included 2,409,145 shares issuable on exercise of a warrant held by IBM. As of December 31, 1999, Sears beneficially owned approximately 4,536,778 shares, or 6.9%, of PCC's common stock, which included 2,409,145 shares issuable on exercise of a warrant held by Sears.

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Case:

Zeran v. American Online, 129 F.3d 327 (8th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 11

Statutes:

28 U.S.C. § 1257 1

47 U.S.C. § 230 9

REASONS FOR DENYING THE WRIT

In this case, the courts of New York ruled, as a matter of state common law, that Respondent Prodigy Services Company ("Prodigy" or "Respondent") is not liable for allegedly defamatory statements contained in an e-mail message and two bulletin board postings sent without its knowledge or participation by third parties wrongfully using its "e-mail" and "bulletin board" services; or for two internal memorandums that were never published to third parties. The New York courts expressly declined to decide whether Prodigy was also immune from liability under federal law.

Although Petitioner cites 28 U.S.C. § 1257 as the basis for review by this Court no treaty or statute of the United States nor any state statute was called in question by the New York decision, and no federal right, privilege or immunity was implicated. Furthermore, the Petition fails to show, as required by Rule 14(1)(g)(i) of this Court, that any claimed federal question was timely and properly raised in state courts. Accordingly, the instant Petition states no jurisdictional basis for review by this Court.

NEITHER THE RECORD NOR THE DECISIONS BELOW RAISE ANY QUESTION FOR REVIEW BY THIS COURT

Prodigy is an internet service provider (ISP) that provides subscribers with electronic transmission lines allowing them to transmit e-mail messages world-wide as well as to post electronic "Bulletin Board" messages for other subscribers to access and read.

On September 9, 1994 an unknown imposter who had fraudulently opened a Prodigy account in the teenage petitioner's name, sent an e-mail message to the Boy Scout troop leader of Troop Five, Westchester County, New York stating:

> From: ALEX LUNNEY (EGYD83A)
>
> Subject: HOW I'M GONNA' KILL U
>
> Sent on: 9/09 at 4:30 P.M.
>
> YOU PIECE OF SHIT. I'M FUCKING ALEX LUNNEY OF TROOP ONE AND I'M GONNA' KICK YOUR ASS, YOU FAT PIECE OF SHIT! I WANT TO BUTT FUCK YOUR SONS ONE AT A TIME AND THEN I'M GONNA' SHOW YOUR WIFE HOW A REAL BOY SCOUT PITCHES A TENT!

(A-416).[1]

As shown without contradiction in the Courts below, Prodigy did not participate in or know of the e-mail message, which was automatically deleted from the receiver's mailbox after it was sent (A-215, A-232).

When Petitioner's father, an attorney and former prosecutor, lodged a complaint, Prodigy "undertook a thorough investigation in an effort to identify the individual(s) that fraudulently opened accounts under

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1. "A" references are to the record ("Appendix") in the New York Court of Appeals.

plaintiff's name and sent the e-mail message" but "despite Prodigy's efforts, such individuals were never identified" (A 219, A 232). Prodigy officials apologized to petitioner (A 224) and separately to petitioner's father, "personally and on behalf of Prodigy Services Company" on October 28, 1994, stating (A 224-5):

> an as-yet unknown person opened a series of accounts in your son's name (although you mentioned that you have a suspicion who is responsible) . . . Unfortunately, a handful of people will sometimes seek to abuse the system in order to defraud companies such as Prodigy and/or victimize innocent people such as your son. There is simply no way to guarantee that our system will never be abused . . . Nor has Prodigy failed to act. We have canceled every account opened in your son's name, and are monitoring for any further activity. We have of course cancelled the balance incurred. We are conducting our own investigation into this matter, and we also stand ready to work with appropriate law enforcement agencies should they choose to ask that of us . . . [L]et me propose that we work together fixing the blame where it properly belongs.

Instead of working with Prodigy, appellant's father brought this action against Prodigy on behalf of his son Alexander, seeking money damages.

When discovery proceedings unearthed two archived "bulletin board" messages that had been posted on September 5 and September 7, 1994, as well as an internal electronic

bookkeeping entry and a clerk's handwritten internal memorandum, appellant was allowed to add them to an Amended Complaint as four additional claims, together with the original e-mail claim.

The two bulletin board messages read:

. . . BULLETIN BOARD PAGE 14 . . .

15:16:49

CLUB: SPORTS SUBMITTED: 09/05/94
TOPIC: BASKETBALL . . . FROM . . . ALEX LUNNEY
SUBJECT B/BALL . . . TO: . . . JENNIFER WILSON
LINE #1— HEY JENNIFER, BLOW ME!

(Exhibit A to Amended Complaint at A-27.)

. . . BULLETIN BOARD PAGE 38 . . .

16:30:55

CLUB: SPORTS SUBMITTED: 09/07/94
TOPIC: BASKETBALL . . . FROM . . . ALEX LUNNEY
SUBJECT B/BALL TO: . . . MIKE MULLER
LINE #1— HEY MIKE. SHE GETS HOME FROM THE WHOREHOUSE AT NOON, YOU
LINE #2— CAN ORDER HER SERVICES THEN
LINE #5—

ALEX

(Exhibit B to Amended Complaint at A-28.)

The electronic bookkeeping entry, dated February 10, 1995, read:

> "SUB IS A NON-PAY DISCONNECT SUBSCRIBER 143 DAYS DELINQUENT. (A-530)

The handwritten internal memorandum dated February 13, 1995 stated:

> ALEX LUNNEY has been terminated for cc [credit card] fraud as well as obscene material
>
> Cc#4128361492586321
> ID's CPYB83
> ATUP88
> GCYK50
> EUN400
> CHUU08
> FYDK55
> DYJH86
> DHYA21
> MATM61
>
> I also have several other acc's [accounts] that have been terminated if you'd like this information, let me know, there are about 20 pages or more. (A-30).

It was shown below that the two internal messages were addressed to the "Lunney" accounts being closed, not to petitioner personally, that they resided solely in Prodigy's internal records until they were located in discovery proceedings and that they were never published to third parties. (A 515-18).

As to the two bulletin board messages, it was shown that they were "unknown to Prodigy until they were uncovered in the course of discovery" and that although copies of such postings "are retained in Prodigy's archive (from where the postings at issue were retrieved during discovery) the postings themselves are automatically deleted shortly after their having been posted."[2]

The Petition for Certiorari makes a number of references to "facts" that are incorrect and contrary to the record. Thus, at page 4 of the Petition, it is asserted that Prodigy was guilty of a purported "refusal to correct the situation after being informed by Petitioner that those accounts were not opened or used by him." In fact, Prodigy apologized to petitioner, closed the fraudulent accounts and launched an investigation to find the perpetrator. There was no "refusal to correct the situation" and none is cited.

Similarly, Petitioner (at p. 4) refers, contrary to the record, to "Prodigy's refusal to stop attributing the conduct to him," and (again at page 4 of the Petition) to Prodigy purportedly having "affirmatively posted notices accusing Petitioner of being a delinquent debtor and a credit card fraud," and (at page 6 of the petition) contends that "Prodigy

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2. The affidavit of Alexander Lunney, submitted at pp. 33-51 of the Appendix to the Petition for Certiorari, refers to additional scurrilous messages sent via Prodigy concerning a high school classmate, Alex Borges (Appendix pp. 38-42). Alexander Lunney admitted below that he knew that two boys in his high school class were fraudulently opening Prodigy accounts in the name of the Borges family and "joking about it and bragging" (A 82-4) but did not notify Prodigy or anyone else until he found himself similarly victimized by this sophomoric prank. The "Borges" messages were never sued upon and have no relevance to the instant case.

itself independently posted its own messages accusing Petitioner by name of being a fraud and a malicious criminal." No such events occurred. All of these incorrect statements appear to be distorted references to the two internal Prodigy bookkeeping documents (quoted in full above) that were located in discovery. Those internal memoranda were never "posted" and did not evidence any accusation made by Prodigy against petitioner or any "refusal" by Prodigy to "rectify" whatever it could.

At page 7, the Petition again falsely asserts that "Prodigy itself accused Petitioner of transmitting the abusive, obscene and sexually explicit material through the Prodigy service," and that Prodigy "maliciously published its own notice falsely accusing petitioner, by name, of credit card fraud and obscenity" and that these "notices were transmitted by Prodigy months after this action has commenced." This time the petition references the attached Lunney affidavit (at pp. 37-8 of the Appendix to the petition), thereby confirming that Petitioner is repetitively making grossly distorted references to the same two Prodigy internal bookkeeping memoranda and nothing else. Although the Lunney affidavit asserts that these internal messages were purportedly published by Prodigy, "through its network", this unsupported assertion is completely contradicted by the record, which showed that the two messages existed solely in Prodigy's internal records until discovery proceedings unearthed them.

While Respondent deems it appropriate to point out the above inaccuracies (as it did when similarly inaccurate contentions were made in the New York courts), such issues were considered fully by the state courts of New York and petitioner's position was rejected as a matter of state law.

New York's intermediate appellate court, the Appellate Division, ruled that the two internal memoranda, which petitioner here repeatedly attempts to distort and misstate, were privileged internal communications among Prodigy's staff, that they "are shielded by the common interest privilege and that there is no proof of actual malice" that would defeat the privilege. (See Appellate Division opinion, at page 27 of the Petitioner's Appendix). The Court of Appeals, in affirming, found Lunney's claims based on the internal memoranda to be unworthy of separate discussion, stating "We have considered Lunney's remaining causes of action against Prodigy and find them to be without merit." (See p. 10 of Petitioner's Appendix).

The Court of Appeals rejected the e-mail claim on two common law grounds — that Prodigy was not the "publisher" of the e-mail under New York libel law and that, even if it could be deemed the publisher, its unknowing transmission of such an e-mail was privileged. As the Court stated (see p. 5-6 of Appendix to Petition):

> Because Lunney's defamation action is grounded in New York common law, we evaluate it in accordance with our established tort principles. . . . We conclude that under the decisional law of this state, Prodigy was not a publisher of the e-mail transmitted through its system by a third party.
>
> Moreover, we are unwilling to deny Prodigy the common law qualified privilege accorded to telephone and telegraph companies. The public would not be well served by compelling an ISP to examine and screen millions of e-mail

> communications, on pain of liability for defamation. Considering that in the case before us there is no basis upon which to defeat the qualified privilege, it should and does apply here.

As to the two bulletin board messages, the Court of Appeals found the analysis "more complicated" but again concluded that, under the circumstances presented, "Prodigy was not a publisher of the electronic bulletin board messages" as a matter of New York law.

In both New York appellate courts, Prodigy argued that the e-mail and bulletin board claims were also barred by Section 230 of the federal Communication Decency Act ("CDA"), 47 U.S.C. § 230. Petitioner, as he concedes (p. 21 of Petition) argued that the federal statute "was inapplicable to his claims." Both the Appellate Division and the New York Court of Appeals expressly declined to rule on this point. The Appellate Division stated:

> We need not decide what is thus the essentially academic question of whether this Federal statute would apply to all or part of the allegations of the plaintiff's amended complaint.

(See p. 25 of Petitioner's Appendix).

In its affirmance, the New York Court of Appeals similarly stated:

> The parties have disagreed over the applicability of the Communications Decency Act (47 U.S.C. § 230) (CDA) and the merits of *Zeran v. American Online*, 129 F.3d 327 [4th Cir. 1997],

> cert. denied, 524 U.S. 937, 118 S. Ct. 2341, 141 L. Ed. 2d 712 . . . [We] decline the invitation to come down on either side of this debate. This case does not call for it.

(See pp. 9-10 of Petitioner's Appendix).

Accordingly, this libel suit was dismissed by the New York Courts solely on state common law grounds. The decision raises no issue warranting review by this Court.

Even though petitioner admittedly argued in the New York courts that the CDA was "inapplicable to his claims," the petition now argues (p. 21) that "the New York Courts were in error in finding . . . that the CDA was irrelevant . . ." The petition contends (p. 22) that "the state courts below were wrong to ignore the CDA's pronouncements . . . [and this] is totally consistent with Petitioner's argument that the CDA's immunity provisions do not govern his liability claims. . . ."

In fact, petitioner's attempt to argue below that the CDA does not govern his case is totally inconsistent with his attempt to argue here that the New York courts incorrectly ignored the CDA. Quite apart from such logical inconsistency (and petitioner's failure to preserve such an objection) petitioner makes no showing that New York's application of its libel laws to deny liability in this case is "in conflict with the Supremacy, Commerce, Obligation of Contracts, Due Process and Equal Protection clauses" (as argued in the Petition, p. 22). Significantly, the Petition cites no authority whatever in support of such a proposition and no stage in the state proceedings in which petitioner raised it.

It may be noted that in *Zeran v. American Online*, 129 F.3d 327 (8th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), where the Fourth Circuit Court of Appeals held that § 230 of the CDA prohibits claims against internet service providers for third party transmissions, this Court denied review. New York's similar decision, based on state common law, presents even less occasion (indeed, none) for review by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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